

Nova Law Review

Volume 5, Issue 2

1981

Article 4

Electoral Graffiti: The Right to Write-in

Robert Batey*

*

Copyright ©1981 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). <https://nsuworks.nova.edu/nlr>

Electoral Graffiti: The Right to Write-in

Robert Batey

Abstract

The election of 1980 focused unprecedented attention on the discontented voter.

KEYWORDS: electoral, write-in, graffiti

Electoral Graffiti: The Right to Write-in

Robert Batey*

The election of 1980 focused unprecedented attention on the discontented voter. The presidential candidacies of John Anderson, Ed Clark of the Libertarian Party, and Barry Commoner of the Citizen's Party appealed directly to those unhappy with the choice offered by the two-party system.¹

While the presence on the ballot of an independent or third-party candidate can provide the discontented with an alternative to not voting, this option is not frequently available. When it is not, the voter's only affirmative way of expressing his discontent is to write on the ballot the name of an individual who meets the qualifications for the office involved, but who is not a declared candidate. The right to cast such a "write-in vote," and to have that vote counted, is the subject of this article.

The implementation of electronic voting² sparked recent legal interest in write-in voting in Florida. First permitted in 1973,³ electronic voting did not become a significant part of Florida's electoral system until 1977, when the earlier legislation was overhauled.⁴ Also in 1977, the Legislature systematically removed virtually every reference in the election laws to write-in voting.⁵ Robert L. Shevin, then Florida's At-

* Associate Professor, Stetson University College of Law. B.A., Yale University, 1970; J.D., University of Virginia, 1974; LL.M., University of Illinois, 1976. The author, who was plaintiff and counsel *pro se* in the case discussed in the text at notes 34-40 *infra*, wishes to thank the following Stetson law graduates for their assistance in the preparation both of that lawsuit and of this article: Deborah A. Bushnell and Sara M. Fotopulos. Of course, Ms. Bushnell and Ms. Fotopulos bear no responsibility for any of the views expressed by the author.

1. See generally A. HADLEY, *THE EMPTY POLLING BOOTH* (1978).

2. See Electronic Voting Systems Act, FLA. STAT. §§ 101.5601-.5615 (1979).

3. Ch. 73-156, 1973 Fla. Laws 298.

4. Ch. 77-175, 1977 Fla. Laws 903.

5. See, e.g., *id.* § 66, *repealing* FLA. STAT. § 101.091 (1975) (providing in part "nothing in this code [shall be] construed to prevent any elector, at any general elec-

torney General, concluded that “[s]ince . . . there are no longer any provisions in the election code for write-in ballots . . . , they have been effectively prohibited.”⁶

One can only guess at the motivations of the 1977 legislators who voted to prohibit write-in voting. One factor, however, may have been the recognition that write-in voting complicates the electronic tabulation of votes.⁷ Accordingly, a prohibition on write-in votes would facilitate the adoption of electronic voting.

This article describes methods of resisting the Florida Legislature’s attempt to ban write-in voting. Part I explores the federal constitutional challenge to such a ban. Part II considers the impact of the Florida Constitution on the action of the 1977 Legislature. In the latter context, the 1979 decision in *Smith v. Smathers*,⁸ which partially revived the practice of write-in voting, will be discussed.

I

Although no specific language exists in the United States Constitution guaranteeing the right to vote, this right has long been accorded constitutional status.⁹ It can be argued persuasively that this right includes the right to cast a write-in vote.

tion, from voting at a general election for any qualified person other than those whose names are printed on the ballot”).

Interestingly, there was one oversight. Section 101.5606, which sets out the requirements that an electronic voting system must meet, indicates that every such system used in Florida must provide “a method for write-in voting.” *Id.* § 101.5606 (1979). Perhaps this requirement was retained in order that the systems could be used in municipal elections, in which the 1977 legislation permitted write-in voting. *See* note 6 *infra*.

6. Letter from Robert L. Shevin to Robert Batey, dated July 20, 1978 (on file with the author). Attorney General Shevin added, however, “This action would not prohibit the use of such voting in a municipal election unless said municipality adopted the state election code.” *Id.*

7. Tabulation by “data processing machines” is the essential feature of an electronic voting system. FLA. STAT. § 101.5602 (1979). Not only must write-in votes be hand counted, but they also require close examination of the ballot cards in order to prevent multiple voting.

8. 372 So. 2d 427 (Fla. 1979).

9. *Reynolds v. Sims*, 377 U.S. 533, 554-56 (1964) (collecting cases).

A

To restrict a voter to only those candidates whose names appear on the ballot arguably denies him any affirmative method of expressing his dissatisfaction with the listed candidates. He faces one choice: he must either select from a group of candidates, all of whom he deems unworthy, or not vote at all. In *Socialist Labor Party v. Rhodes*,¹⁰ a three-judge panel of the United States District Court for the Southern District of Ohio recognized that forcing such a choice on a voter is constitutionally intolerable. Under then prevailing Ohio law, a voter could cast a write-in ballot in a given election only if there were no names on the ballot for that contest. Members of the Socialist Labor Party and of the American Independent Party, unable to have the names of their parties' presidential and vice-presidential nominees placed on the official Ohio ballot, sought injunctive relief assuring that they would at least be able to write in the names of their candidates. In a per curiam opinion, the three-judge court ordered such relief:

Voters are often not content to vote for one of the candidates nominated by the two major parties. A write-in ballot permits a voter to effectively exercise his individual constitutionally protected franchise A blanket prohibition against the use of the write-in ballots denies . . . qualified electors . . . the right to freely participate in the electoral process as guaranteed by the Constitution¹¹

The plaintiffs in *Socialist Labor Party* appealed because they sought not just the right to write-in but also a place on the official ballot for their respective nominees. The United States Supreme Court granted this additional relief to the American Independent Party plaintiffs, but not to the Socialist Labor Party plaintiffs. In its opinion, the Supreme Court did not address the write-in voting question because no appeal had been taken from that portion of the three-judge panel's opinion granting plaintiffs the right to write-in.¹²

10. 290 F. Supp. 983 (S.D. Ohio 1968), *aff'd in part and modified in part sub nom.* Williams v. Rhodes, 393 U.S. 23 (1968). For a discussion of the case on appeal, see text at notes 12 & 36-37 *infra*.

11. 290 F. Supp. at 987 (citation omitted).

12. 393 U.S. at 26. Other readings of the Supreme Court's opinion are possible. See text at notes 36 & 37 *infra*.

Socialist Labor Party is one of only three reported cases that fully considers the claim that there is a federal constitutional right to write-in. The others are *Thompson v. Willson*,¹³ a Georgia case, and *Kamins v. Board of Elections*,¹⁴ a case arising in the District of Columbia.

As in *Socialist Labor Party*, the court in *Thompson* found that the United States Constitution guarantees the voter "the right to write the name of his choice and to strike the name presented to him. . . ."¹⁵ In voiding a statute that prohibited write-in voting, the Georgia Supreme Court wrote, "We have heard of similar methods of holding elections in other so-called democratic countries . . . , but this is not the American way"¹⁶

In *Kamins*, the District of Columbia Court of Appeals all but upheld the federal constitutional claim asserted by the plaintiff. Faced with a statute that allowed the counting of votes only for candidates "whose name[s] appear on the general election ballot,"¹⁷ plaintiff objected, alleging a violation of the constitutional right to vote for an otherwise qualified candidate whose name was not on the ballot. Quoting extensively from *Socialist Labor Party*, the court construed the relevant statutory language to permit write-in voting.¹⁸ Considering the plain language of the statute and the court's heavy reliance on *Socialist Labor Party*, the result in *Kamins* is tantamount to a holding that a prohibition on write-in voting would be unconstitutional.

Numerous reported cases have dealt with the right to write-in as a matter of state constitutional law. Indeed, *Thompson* held that the statute struck down in that case violated both the United States and the Georgia Constitutions.¹⁹ These state constitutional law holdings are relevant to the federal constitutional question because few of these cases rely on specific constitutional language regarding the right to write-in; instead, the cases consider whether this right derives from the general concept of a right to vote. Thus, these decisions are persuasive authority for a similar interpretation of the federally guaranteed right

13. 223 Ga. 370, 155 S.E.2d 401 (1967).

14. 324 A.2d 187 (D.C. 1974).

15. 223 Ga. at —, 155 S.E.2d at 404.

16. *Id.*

17. D.C. CODE § 1-1110(a)(2) (1973).

18. 324 A.2d at 193-94.

19. 223 Ga. at —, 155 S.E.2d at 404.

to vote.

Besides the Georgia Supreme Court, the highest courts in Colorado,²⁰ Florida,²¹ Iowa,²² and Maryland²³ have invalidated statutes prohibiting write-ins on state constitutional grounds. Four courts have reinterpreted statutes that appear to outlaw write-in voting, specifically in order to save the enactments from violating state constitutional law.²⁴ Furthermore, several other courts have expressed in dicta that their state constitutions guarantee the right to write-in.²⁵

Of all the cases dealing with write-in voting as a matter of state constitutional law, the most thorough discussion appears in *Jackson v. Norris*, a 1937 decision of the Maryland Court of Appeals.²⁶ In that case, a voter sued to nullify a contract, executed by the Baltimore City Voting Machine Board pursuant to statute, for the purchase of voting machines that did not permit write-in voting. The trial court granted the desired relief, and the court of appeals affirmed. The appellate court emphatically determined that the right to vote included the right to write-in: "An election is not free, nor does the elector enjoy a full and fair opportunity to vote, if the right of suffrage is so restricted by statute that he may not cast his ballot for such persons as are his choice for the elective office."²⁷

Considering the argument that one vote is a trivial concern, the court responded that it was "no minor matter".²⁸

20. *Littlejohn v. People ex rel. Desch*, 52 Colo. 217, 121 P. 159 (1912).

21. *Smith v. Smathers*, 372 So. 2d 427 (Fla. 1979); *State ex rel. Lamar v. Dillon*, 32 Fla. 545, 14 So. 383 (1893). *But see Pasco v. Heggen*, 314 So. 2d 1 (Fla. 1975). For a detailed discussion of these cases, see text at notes 51-71 *infra*.

22. *Barr v. Cardell*, 173 Iowa 18, 155 N.W. 312 (1915).

23. *Jackson v. Norris*, 173 Md. 579, 195 A. 576 (1937).

24. *Conn v. Isensee*, 45 Cal. App. 531, 188 P. 279 (1920); *Stewart v. Cartwright*, 156 Ga. 192, 118 S.E. 859 (1923); *Mayor v. State ex rel. Howie*, 102 Miss. 663, 59 So. 873 (1912) (*but see McKenzie v. Boykin*, 111 Miss. 256, 71 So. 382 (1916)); *Park v. Rives*, 40 Utah 47, 119 P. 1034 (1911).

25. *People ex rel. Hoyne v. McCormick*, 261 Ill. 413, 103 N.E. 1053 (1914); *Cole v. Tucker*, 164 Mass. 486, 41 N.E. 681 (1895); *Westcott v. Scull*, 87 N.J.L. 410, 96 A. 407 (1915); *People ex rel. Bradley v. Shaw*, 133 N.Y. 493, 31 N.E. 512, 19 N.Y.S. 302 (1892); *Oughton v. Black*, 212 Pa. 1, 61 A. 346 (1905); *State ex rel. Runge v. Anderson*, 100 Wis. 523, 76 N.W. 482 (1898).

26. 173 Md. 579, 195 A. 576 (1937).

27. *Id.* at —, 195 A. at 586.

28. *Id.*

It must be considered in this connection that every voter has but a single vote to cast. This vote, whether cast with the majority or the minority, is as important in terms of personal value and constitutional significance as every other vote. The futility of the elector's vote is not the measure of his constitutional right. The civic and political importance of an unabridged and unhampered choice lie in the freedom of the elector to exercise fully this right on any occasion. . . .²⁹

From this argument of a single votes insignificance, the court in *Jackson* turned to a consideration of the would-be write-in voter's main alternative: seeking a place on the official ballot for his candidate. But this, according to the Maryland Court of Appeals, was not an "equivalent . . . constitutional substitute. . . . [D]eprivation of [the elector's] right to vote for his own choice is not compensated by the privilege to make the costly, precarious, and laborious efforts to unite the large group of voters . . . which would be necessary"³⁰

Not all courts have followed this reasoning.³¹ The contrary decisions lack support for the conclusion that write-in voting may be prohibited without abridging the right to vote; typically, there is only reference to the legislature's general power to regulate the conduct of elections.³² Surveying these cases, one can conclude, as did the Maryland Court of Appeals in *Jackson*, that "[t]he decisions of [these] states . . . are opposed by a preponderance of authority, and the grounds on which they rest are not persuasive in view of the reasons assigned in support of the majority view."³³

29. *Id.* at ___, 195 A. at 587.

30. *Id.* at ___, 195 A. at 586.

31. *Davidson v. Rhea*, 221 Ark. 885, 256 S.W.2d 744 (1953) (5-2 decision); *Pasco v. Heggen*, 314 So. 2d 1 (Fla. 1975); *State ex rel. Mize v. McElroy*, 44 La. Ann. 796, 11 So. 133 (1892); *McKenzie v. Boykin*, 111 Miss. 256, 71 So. 382 (1916); *Mullholand v. Batt*, 164 Ohio St. 362, 130 N.E.2d 805 (1955) (upholding the statute declared unconstitutional in *Socialist Labor Party v. Rhodes*); *Chamberlin v. Wood*, 15 S.D. 216, 88 N.W. 109 (1901) (2-1 decision). For a discussion of *Pasco v. Heggen*, see text at notes 56-65 *infra*. For a discussion of *Socialist Labor Party v. Rhodes*, see text at notes 10-12 *supra*.

32. See, e.g., *Davidson v. Rhea*, 221 Ark. at ___, 256 S.W.2d at 746, quoting *Chamberlin v. Woods*, 15 S.D. at ___, 88 N.W. at 111. *Pasco v. Heggen*, see note 31 *supra*, is not typical of such cases. *Pasco* develops a unique restriction on the right to write-in and supports it with unique reasoning. See text at notes 56-65 *infra*.

33. 173 Md. at ___, 195 A. at 588.

Examination of the cases dealing with the right to write-in reveals substantial recognition of that right. No reported case explicitly dealing with a federal constitutional argument questions the existence of such a right. In addition, a preponderance of the cases considering a state constitutional argument supports the proposition that the right to vote includes the right to cast a write-in ballot. Thus, there is considerable force to the contention that the United States Constitution guarantees the right to write-in.

B

In an unreported decision rendered in November of 1978, the United States District Court for the Middle District of Florida rejected this contention,³⁴ finding no federal constitutional violation in Florida's prohibition on write-in voting. The district court reached this conclusion, which is of major significance in Florida, in two main steps.

First, the court considered the significance of *Socialist Labor Party v. Rhodes*,³⁵ the only other federal court decision directly on point. The court considered the opinion of the three-judge panel in *Socialist Labor Party* undercut by the action taken by the United States Supreme Court on appeal.

The plaintiffs in *Socialist Labor Party* sought either a place on the ballot for their candidates or the right to write-in those candidates' names. The three-judge panel considered each of these claims separately. According to the Florida federal court, however, "[T]he Supreme Court's analysis . . . took a different approach. There was no discussion of the right to vote as a matter completely distinct from ballot access."³⁶ Rather, continued the district court, the reasoning of the Supreme Court implied that "the right to vote is intimately related to the right of access to the ballot (indeed, The Supreme Court has . . . stated [in another case] that the rights of voters to vote and of candidates to ballot access are 'intertwined.')" ³⁷ Thus, the Florida federal court concluded that the constitutional status of the right to write-in could not be judged without reference to those constitutional decisions

34. Batey v. Krivanek, No. 78-815 (M.D. Fla., Nov. 22, 1978) (Krentzman, J.).

35. See text at notes 10-12 *supra*.

36. No. 78-815, slip op. at 5.

37. *Id.* (quoting *Lubin v. Panish*, 415 U.S. 709, 715 (1974)).

concerning a candidate's right of access to the ballot. Because the lower court's decision in *Socialist Labor Party* had not done this, the district court reasoned that case's holding was questionable.

This reasoning foreshadowed the second step in the federal district court's analysis: examination of the ballot access cases. The district court emphasized the recognized right of a state to "keep its ballots within manageable, reasonable limits"³⁸ by "limiting places on the ballot to those who can demonstrate substantial popular support."³⁹ Then the court related these holdings to the "intertwined" right to vote. The court wrote: "If the number of places on the ballot can be so limited, it follows that there cannot simultaneously exist an unrestricted right to cast write-in votes for whomever the voter thinks should be a candidate."⁴⁰

This sentence forms the crux of the district court's opinion, and its logic is quite simple. The state's power to keep a candidate's name off the official ballot necessarily includes the power to prevent individual voters from adding that name to their ballots. While simple, this logic is not unassailable. Indeed, both steps in the district court's analysis invite criticism.

The federal court erred in its reading of the action taken by the Supreme Court in *Socialist Labor Party*. First, the district court failed to consider the fact that the defendants in *Socialist Labor Party* did not appeal.⁴¹ Thus, the only issue properly before the Supreme Court was the three-judge panel's refusal to place plaintiffs' candidates on the official ballot. Not surprisingly, the Supreme Court did not view the right to vote as a matter separate from ballot access.

Nonetheless, considerable authority does exist to support the proposition that the rights to vote and to ballot access are intertwined. But attentive reading of the ballot access cases shows that they are not as

38. *Id.* at 6, (citing *Bullock v. Carter*, 405 U.S. 134 (1972)).

39. *Id.* (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)).

40. *Id.*

41. This oversight is understandable because both parties to the Florida lawsuit also overlooked this fact in the memoranda they filed with the district court. *See, e.g.*, Memorandum in Support of Plaintiff's Motion for Preliminary Injunction, *Batey v. Krivanek*, No. 78-815, slip op. at 2-3 (M.D. Fla., filed Sept. 28, 1978) (arguing erroneously that the Supreme Court had affirmed the write-in holding of the three-judge panel).

closely interrelated as the district court found.

A state may, under certain circumstances, deny a candidate a place on its official ballot without violating the federal constitution.⁴² But the state interest that is served by such a limitation is the desire to keep “ballots within manageable, understandable limits.”⁴³ The concern is that “‘laundry list’ ballots [will] discourage voter participation and confuse and frustrate those who do participate. . . .”⁴⁴ Seen in this light, a limit on ballot access does not conflict with the right to write-in. Allowing write-in votes does not expand the ballot (except to add a blank space under each office), nor does it confound or deter the would-be voter. Thus, the ballot access cases do not implicitly deny the right to write-in.

In fact, the ballot access cases provide arguments supporting the right to write-in, rather than reasons for denying that right. The United States Supreme Court has frequently cited the fact that a state permits write-in votes as a reason for allowing that state to limit a candidate’s access to the ballot. In *Jenness v. Fortson*,⁴⁵ the Court upheld a set of Georgia laws keeping off the ballot any minor-party or independent candidate who could not garner the signatures of five percent of the voters in the previous general election. In approving these laws, the Court noted:

[T]hese procedures relate only to the right to have the name of a candidate or the nominee of a “political body” printed on the ballot. There is no limitation whatever, procedural or substantive, on the right of a voter to write in on the ballot the name of the candidate of his choice and to have that write-in vote counted.⁴⁶

Therefore, the fact that a voter could write in the name of a candidate denied ballot access was one reason for allowing the state to limit that access. Similar reliance on the availability of write-in votes is found in *Storer v. Brown*,⁴⁷ and in *American Party v. White*,⁴⁸ companion cases

42. *Jenness v. Fortson*, 403 U.S. 431 (1971).

43. *Lubin v. Panish*, 415 U.S. 709, 715 (1974) (emphasis added).

44. *Id.*

45. 403 U.S. 431 (1971).

46. *Id.* at 434.

47. 415 U.S. 724, 736 n.7 (1974) (upholding California’s requirement that

applying the ballot access principles of *Jenness*. Considering *Jenness*, *Storer*, and *American Party*, one court has concluded that they lend credence to the argument that there is a federal constitutional right to write-in.⁴⁹

Contrary to the reasoning of the United States District Court for the Middle District of Florida, the ballot access cases decided by the Supreme Court do not necessitate denial of the existence of a constitutional right to write in. This right and the right to a place on the ballot are not that closely intertwined. Rather, the rights are complementary. The Supreme Court's cases imply that, because a state may limit one of these political rights, access to the ballot, it must honor the other the right to cast a write-in vote.

II

The case for write-in voting draws support not only from the United States Constitution, but also from the constitutions of the several states.⁵⁰ In Florida, the status of write-in voting as a matter of state constitutional law has developed in a decidedly distinctive fashion. With respect to this issue, no other state's constitutional documents have been interpreted as Florida's have. Almost a century of Florida jurisprudence has produced this result: there is a state constitutional right to cast a write-in vote, but only if the vote is cast for someone who has "qualified" as a write-in candidate.

This interpretation of the Florida Constitution, while better than a denial of the right to write-in, is unsatisfactory on many counts. The Florida Supreme Court should abandon this interpretation, replacing it with a broader recognition of the right to cast a write-in vote.

minor-party and independent candidates have been disaffiliated from the major parties for at least a year).

48. 415 U.S. 767, 772 n.3 (1974) (upholding Texas's requirement that minor-party and independent candidates show substantial support through either previous balloting, nominating conventions, or petitions).

49. *Kamins v. Board of Elections*, 324 A.2d 187, 193 n.11 (D.C. 1974).

50. See text at notes 19-25 *supra*.

A

The right to write-in was first found in the state constitution in 1893. In *State ex rel. Lamar v. Dillon*,⁵¹ the state attorney general brought a quo warranto action against thirteen councilmen of the city of Jacksonville. Attorney General Lamar contended that the councilmen had been elected pursuant to an unconstitutional statute and, therefore, had unlawfully usurped the offices of their predecessors. Among the allegedly unconstitutional features of the statute was a prohibition on write-in voting in the Jacksonville election.⁵²

While rejecting the rest of the attorney general's challenges to the election statute, the Florida Supreme Court agreed that the ban on write-in voting violated the state constitution's pledge that "in all elections by the people, the vote shall be by ballot."⁵³ Construing this general recognition of the right to vote, the court held: "[T]he legislature cannot, in our judgment, restrict an elector to voting for some one of the candidates whose names have been printed upon the official ballot. He must be left free to vote for whom he pleases. . . ."⁵⁴ After finding one portion of the statute unconstitutional, the state supreme court went on to uphold the challenged election, because there was no allegation by the attorney general that any Jacksonville voter had wanted to cast a write-in vote.⁵⁵

The broad language of this 1893 decision, recognizing a right to vote as one "pleases," remained an unchallenged facet of Florida's jurisprudence for more than eighty years. For this reason, the plaintiffs in *Pasco v. Heggen*,⁵⁶ a 1975 decision of the state supreme court, must have been surprised to find that court undercutting its previous position.

51. 32 Fla. 545, 14 So. 383 (1893).

52. There was no explicit prohibition; however, the state supreme court concluded that "the only fair and reasonable construction [of the statute] restrict[s] the voter to a choice of candidates printed on the ballot." *Id.* at 582, 14 So. at 394.

53. This provision appeared in article VI, section 6, of the 1885 Constitution.

54. 32 Fla. at 579, 14 So. at 393-94. This language echoes an earlier decision, *State v. Anderson*, 26 Fla. 240, 8 So. 1 (1890): "The distinguishing theory of the ballot system is that every voter shall be permitted to vote for whom he pleases. . . ." *Id.* at 259, 8 So. at 5, quoted at 32 Fla. at 579, 14 So. at 393.

55. 32 Fla. at 585-86, 14 So. at 396.

56. 314 So. 2d 1 (Fla. 1975).

Plaintiffs Pasco and Perkins wanted to cast write-in votes in a Tallahassee city commission election. They were prevented from doing so by the combined effect of two state statutes: one prescribing the means by which a person may qualify as a write-in candidate, and another providing a space on the ballot for write-in votes only when a write-in candidate has qualified.⁵⁷ Because no one had registered as a write-in candidate for the Office of Tallahassee City Commissioner, Group I,⁵⁸ Pasco and Perkins were not allowed to write in any name for the office. Their lawsuit claimed that the operation of these two statutes violated the right to vote guaranteed them by the state constitution. Despite the broad language of *State ex rel. Lamar v. Dillon*, the Florida Supreme Court disagreed, upholding the statutes in question.

The court, in an opinion written by Justice Ben Overton, cited *Dillon* with approval,⁵⁹ but then indicated two major reasons why the challenged statutes did not offend the principle enunciated in that case. First was the need "to protect the integrity of [the] political process from frivolous or fraudulent candidacy."⁶⁰ Requiring write-in candidates to register prior to an election⁶¹ and prohibiting write-in votes unless someone does register are constitutionally permissible means of guarding against the last-minute candidate and the nonexistent one.

The second reason offered by the supreme court was the need "to protect the right of privacy for the individual who does not desire to be a candidate."⁶² A decade before *Pasco*, the state supreme court had held in *Battaglia v. Adams*⁶³ that an individual had a legal right to keep his name off the official election ballot.⁶⁴ According to Justice

57. Both statutes have since been revised to omit all reference to write-in voting. Ch. 77-175, §§ 16 & 66, 1977 Fla. Laws 903, amending FLA. STAT. §§ 99.023, 101.251 (1975). *But see* *Smith v. Smathers*, 372 So. 2d 427 (Fla. 1979) (reviving FLA. STAT. § 99.023 (1975)). For a discussion of *Smith v. Smathers*, see text at notes 67-71 *infra*.

58. Under the qualification statute, FLA. STAT. § 99.023 (1975), a write-in candidate must file a notice of his candidacy forty-five days prior to the election.

59. 314 So. 2d at 3.

60. *Id.*

61. See note 58 *supra*.

62. 314 So. 2d at 3.

63. 164 So. 2d 195 (Fla. 1964). For a further discussion of *Battaglia*, see text at notes 82-91 *infra*.

64. *But see* *Yorty v. Stone*, 259 So. 2d 146 (Fla. 1972). For a discussion of

Overton, the right not to be on the ballot was equivalent to a right not to be voted for, and this second right applied whether or not the individual's name appeared on the official ballot.⁶⁵

Pasco undoubtedly emboldened those in the state legislature who wanted to do away with write-in voting entirely. Within two years, even the limited form of write-in voting upheld in *Pasco* was gone; in 1977 the Legislature repealed the statutes at issue in that case, leaving no provision for write-in votes in the election code.⁶⁶

In the first general election following this repeal, Lee Smith, a minor party candidate for the United States House of Representatives, sought to become a write-in candidate when he failed to meet Florida's requirements for ballot access. When informed that write-in votes would not be allowed in the general election, Smith brought suit, claiming a violation of his state constitutional rights. In *Smith v. Smathers*,⁶⁷ the Florida Supreme Court agreed that Smith's rights had been abridged.

Justice Overton's opinion in *Smith* adhered closely to the reasoning he used for the court in *Pasco*. Once again, the court cited with approval *State ex rel. Lamar v. Dillon*.⁶⁸ The *Smith* opinion underscored the importance of *Dillon* by establishing the similarity of the constitutional provisions at issue in both cases.⁶⁹ Because the concerns mentioned in *Pasco* are absent when there is an active write-in candidate (the candidate exists, he must be considered serious, and he has waived any privacy right), the principle enunciated in *Dillon* controlled, and Smith's constitutional claim was upheld.⁷⁰

Yorty, see text at notes 82-91 *infra*.

65. A third reason, the need to keep "ballots within manageable limits," was also mentioned. 314 So. 2d at 3. For a critique of another court's use of the same argument, see text at notes 42-44 *supra*.

66. See text at notes 5-6 *supra*.

67. 372 So. 2d 427 (Fla. 1979).

68. *Id.* at 429.

69. *Id.* at 429 & n.2. Article VI, section 1, of the 1968 constitution provides: "All elections by the people shall be by direct and secret vote." In dissent, Justice Alderman argued that the omission from the 1968 constitution of the word "ballot," which appeared in the 1885 constitution, see text at note 53 *supra*, rendered *Dillon* irrelevant to the constitutional issue in *Smith v. Smathers*. *Id.* at 430-31 (Alderman, J., dissenting).

70. Nevertheless, Smith was denied the relief he sought. Because of the brief

The supreme court's solution to the problem posed by this finding of unconstitutionality was novel. The court declared certain of the repealed statutes relating to write-in voting "revived," to "remain in force and effect . . . until properly changed by the legislature."⁷¹ In other words, the court made part of the statutory scheme upheld in *Pasco* unrepeatable.

The Florida Supreme Court has thus recognized only a limited right to write-in. If there exists a qualified write-in candidate seeking write-in votes, there is a right to cast a vote for such a person, even though his name does not appear on the official ballot. But if no such candidate exists, there is no right to write-in.

B

Florida's limited recognition of a state constitutional right to cast a write-in vote should no longer be followed. In an appropriate case, the Florida Supreme Court should overrule its decision in *Pasco* and return to the more expansive right to write-in recognized in *Dillon*.⁷² The limited right now accorded Florida citizens does not give full scope to the right to vote, nor is the limitation necessary to support the two goals mentioned in *Pasco*.⁷³

Florida's limited right to write-in fails to give adequate scope to the right to vote. The rights of the potential write-in voter are contingent upon the actions of another, the would-be write-in candidate. This places the candidate in a position superior to the voter, violating the cardinal principle of *Dillon* that the voter "must be left free to vote for

time period between the filing of the lawsuit and the general election, the state supreme court denied Smith's application for a writ of mandamus. See 372 So. 2d at 428. The court's declaration that Smith's rights had been violated came months after the election.

71. *Id.* at 429. The revived provisions are FLA. STAT. §§ 99.023, 101.011(2), 101.151(5)(a), (b) (1975), which were amended by Ch. 77-175, 1977 Fla. Laws 903. Section 99.023 deals with the qualification of write-in candidates, see note 58 *supra*, while §§ 101.151(5) and 101.011(2) concern the preparation and marking of official ballots, respectively.

72. These steps would necessarily undercut the language in *Smith v. Smathers* restricting its holding to situations in which there is a qualified write-in candidate.

73. See text at notes 59-65 *supra*.

whom *he* pleases.”⁷⁴ Furthermore, Florida’s current conception of the constitutional right to write-in suggests that the process for qualifying a write-in candidate somehow provides an adequate substitute for writing in the person most qualified, whether a candidate or not. But the process is burdensome, requiring persuasion of the desired candidate substantially in advance of the election.⁷⁵ The court in *Jackson v. Norris*,⁷⁶ an influential decision regarding write-in voting, held that such substitutes cannot justify abridging the right to vote for any qualified person, on the ballot or off.⁷⁷ The Florida Supreme Court would do well to adopt the expansive concept of the right to vote recognized by the Maryland courts in *Jackson*.

Pasco v. Heggen cited the need to maintain the integrity of the election process as a reason for recognizing only a limited right to write-in.⁷⁸ While it is appropriate to be concerned about a “frivolous or fraudulent candidacy,”⁷⁹ this concern does not provide an adequate reason for restricting write-in voting. Some thirty-eight jurisdictions manage to maintain the integrity of their electoral process while permitting virtually unrestricted write-in voting.⁸⁰ The number of states

74. 32 Fla. at 579, 14 So. at 394 (emphasis added). See text at note 54 *supra*.

75. See note 58 *supra*.

76. 173 Md. 579, 195 A. 576 (1937). See text at notes 26-30 *supra*.

77. *Id.* at —, 195 A. at 586. See text at note 30 *supra*.

78. See text at note 60 *supra*.

79. 314 So. 2d at 3.

80. ALA. CODE § 17-8-5 (1977); ALASKA STAT. § 15.15.030 (1976); ARIZ. REV. STAT. ANN. § 16-844 (1975); CONN. GEN. STAT. § 9-309 (Supp. 1977); DEL. CODE ANN. tit. 15, § 4502 (Supp. 1970); D.C. CODE ANN. § 1-1110 (Supp. 1978), *construed in* *Kamins v. Board of Elections*, 324 A.2d 187 (D.C. 1974); GA. CODE ANN. § 34-1224 (1980); IDAHO CODE § 34-906 (Supp. 1980); ILL. REV. STAT. ch. 46, § 24A-7 (Supp. 1978); IOWA CODE § 49.31 (Supp. 1978); KAN. STAT. ANN. §§ 25-616, 25-617 (Supp. 1979); KY. REV. STAT. § 117.265 (Supp. 1980); ME. REV. STAT. ANN. tit. 21, § 702 (1965); MD. ELEC. CODE ANN., art. 33, § 14-1 (1976); MASS. GEN. LAWS ANN. ch. 54, § 42 (West 1980); MICH. COMP. LAWS § 168.737 (1967); MINN. STAT. § 203A.12 (Supp. 1978); MO. REV. STAT. § 115.439.1 (Supp. 1978); MONT. REV. CODES ANN. § 13-12-208 (1980); NEB. REV. STAT. § 32-428 (1978); N.H. REV. STAT. ANN. § 59:58 (1970); N.J. REV. STAT. § 19:15-28 (1964); N.M. STAT. ANN. § 1-8-36 (1978); N.Y. ELEC. LAW § 7-106 (McKinney 1978); N.C. GEN. STAT. § 163-151 (Supp. 1979); N.D. CENT. CODE § 16-12-06 (1971); OR. REV. STAT. § 254.145 (1979); PA. STAT. ANN. tit. 25, § 3063 (Purdon 1980-1981); R.I. GEN. LAWS § 17-19-31 (1969); S.C. CODE § 7-13-1380 (1976); TENN. CODE ANN. § 2-7-117 (1979); UTAH

allowing such voting suggests that the practical problems posed by write-in votes are far from insurmountable; a state can find ways of resolving these problems without restricting the scope of the right to vote.⁸¹

A potentially more compelling reason for limiting the right to write-in is mentioned in *Pasco*: the need to protect the privacy rights of the person for whom the write-in vote is cast.⁸² On close examination, however, this reason loses its appeal. Being the recipient of a write-in vote is a negligible intrusion on privacy, one which does not justify a limitation on write-in voting.

In *Battaglia v. Adams*,⁸³ the state supreme court held that putting Richard Nixon's name on the 1964 Republican presidential primary ballot over his objection violated Nixon's right to privacy.⁸⁴ In *Pasco*, the court cited *Battaglia* in holding that a person has a privacy interest in not receiving a write-in vote.⁸⁵ While case law in another jurisdiction does support the idea that including a person's name on the official election ballot can violate his right of privacy,⁸⁶ the dictum in *Pasco* extending this reasoning to write-in voting is unprecedented. The "intrusion" upon privacy occurring when one is the recipient of a write-in vote seems much too slight to meet the threshold requirement of privacy law that the intrusion be "highly offensive to a reasonable person."⁸⁷ Furthermore, the risk of such an intrusion could justly be characterized as part of the price we each pay for our system of free elections.

CODE ANN. § 20-7-20 (Supp. 1979); VT. STAT. ANN. tit. 17, § 2472 (Supp. 1980); VA. CODE § 24.1-129 (1980); WASH. REV. CODE § 29.51.170 (Supp. 1977); W. VA. CODE § 3-4-8 (1979); WIS. STAT. § 7.50 (1967); WYO. STAT. § 22-10-101 (1977).

81. For example, the Oregon Legislature was concerned about the campaign expenditures of write-in candidates. Rather than requiring such candidates to file expenditure statements prior to the election and prohibiting write-in votes for candidates who did not file, Oregon provided that no write-in candidate who won would be deemed elected until he had filed a campaign expenditure statement. OR. REV. STAT. § 260.245 (1977). *Accord*, WYO. STAT. § 22-16-120 (1977).

82. See text at notes 62-65 *supra*.

83. 164 So. 2d 195 (Fla. 1964).

84. *Id.* at 197 (following OP. ATT'Y GEN. FLA. 060-171 (1960)).

85. 314 So. 2d at 3-4.

86. See W. PROSSER, THE LAW OF TORTS § 117, at 812 & n.12 (4th ed. 1971).

87. RESTATEMENT (SECOND) OF TORTS § 652E (1977).

The Florida Supreme Court recognized as much in a related context. In *Yorty v. Stone*,⁸⁸ a presidential candidate who wanted to compete in some states' primaries, but not Florida's, sought to remove his name from the Florida presidential primary ballot. In 1972, candidate Sam Yorty relied on 1964 noncandidate Richard Nixon's success in obtaining similar relief in *Battaglia v. Adams*. The state supreme court distinguished *Battaglia* because Yorty (unlike Nixon in 1964) remained an announced candidate. His interest in privacy was thus lessened,⁸⁹ and this reduced interest was outweighed by the public interest: "A matter of such magnitude as the selection of the best possible candidate for the highest position in this nation should be controlled by the public's right to a complete expression of their views and not by the individual's personal and tactical choices. . . ." ⁹⁰

Just as the public's right to express its views through voting outweighed Yorty's privacy interest in keeping his name off the primary ballot, so the public's right to vote should outweigh the far smaller privacy interest of the citizen who desires not to receive any write-in votes.⁹¹ In deciding *Pasco v. Heggen*, the Florida Supreme Court should have given as much attention to *Yorty* as it gave to *Battaglia*. The result would have been a less limited concept of write-in voting.

C

The reasons offered for limiting the state constitutional right to cast a write-in ballot are not compelling, and the Florida Supreme Court should abandon its limited conception of that right. Furthermore, even for those who consider the proffered reasons sufficient to justify some limitation on the right to write-in, there is no reason to go as far as the supreme court has gone. The goals of maintaining the integrity of elections and preserving personal privacy can be attained by permitting the disgruntled voter to cast a ballot for "None of the

88. 259 So. 2d 146 (Fla. 1972).

89. *Id.* at 147-48.

90. *Id.* at 149.

91. This balancing is analogous to that performed by the United States Supreme Court when weighing privacy rights against freedom of speech and of the press. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (recognizing freedom-of-expression limitations on the law of libel).

above.”

None-of-the-above voting is currently allowed in general elections only in Nevada.⁹² If adopted in Florida, none-of-the-above voting could operate in this fashion: under each office listed on the official ballot would be the names of the qualified candidate or candidates, plus a slot marked “None of the above.” Votes for “None of the above” would be tallied just like votes for a candidate. “None of the above” could win an election or earn a place in a runoff. If “None of the above” did win, the office would become vacant, to be filled as any office vacated by death or resignation would be.⁹³

None-of-the-above voting poses none of the problems seen in write-in voting. There is no threat to the integrity of the electoral system through fraudulent or frivolous candidates, nor is anyone’s right of privacy breached. If the Florida Supreme Court must allow some limitation on write-in voting, substituting none-of-the-above voting would be the limitation least violative of the right to vote. If the court will not recognize an unlimited right to cast a write-in ballot, it should recognize a state constitutional right to cast a “None of the above” vote.⁹⁴

III

The discontented voter has a right to affirmatively express his disappointment with the elective choices offered him. A right to write-in derives from the federal Constitution and should be recognized by the federal courts. Dissatisfied Florida voters may also rely on the state constitution, which should be interpreted as granting an unrestricted right to write-in (or at least as recognizing a right to cast a “none-of-

92. NEV. REV. STAT. § 293.269 (1979). The provision applies only to statewide contests, however, and none-of-the-above votes do not affect the outcome of these contests. *Id.*

93. See W. ADAMS, A SUGGESTED NEW ARTICLE ON ELECTIONS 11 (August, 1977) (testimony before the Florida Constitutional Revision Commission): the state constitution should “guarantee the right of every voter to cast a negative vote [and] the right to have the vote counted with the same dignity as votes for candidates.”

94. Some may object that there is no basis for reading such a requirement into the state constitution. While the point is well-taken, the court’s action in so reading the constitution would be no more extreme than its holding that the state constitution makes certain election statutes dealing with write-in voting unrepealable. See text at note 71 *supra*.

the-above" vote). Without some judicial action of the sort advocated, the right to vote will most often be meaningful only for those pleased with the choices offered by the two-party system, a group whose number grows smaller with every passing day.